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No. 90-493

In the Supreme Court of the United States

OCTOBER TERM, 1990

DAVID O. CONGER, ET AL., PETITIONERS

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly dismissed for lack of subject matter jurisdiction petitioners' complaint seeking review of a National Labor Relations Board unit clarification decision.

2. Whether the district court properly dismissed petitioners' claim that the union violated its duty of fair representation.

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OPINIONS BELOW

The court of appeals' per curiam order (Pet. App. 1a-2a) is unreported, but the decision is noted at 908 F.2d 979 (Table). The district court's opinion (Pet. App. 3a-8a) is not yet reported. The decision issued by the Regional Director of the National Labor Relations Board (Pet. App. 56a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. United Telephone Company of Florida (UTC) provides local and long distance telephone service in various parts of the State of Florida. International Brotherhood of Electrical Workers, Local 199, AFL-CIO (the Union) has, for many years, represented UTC's bargaining unit employees.[1] Pet. App. 9a-10a.

In 1987, UTC disbanded one of its subsidiaries and transferred the subsidiary's operations to a new division of UTC. Shortly thereafter, UTC filed a petition with the National Labor Relations Board relating to the nine business technicians and one warehouse attendant – eight of whom are the petitioners herein – who had been transferred from its former subsidiary. The purpose of the petition was to determine whether those employees constitute an accretion to the existing bargaining unit at UTC.[2] Pet. App. 10a, 12a-14a, 52a.

The Board's Regional Office conducted an administrative investigation of the petition and, subsequently, held a hearing. On February 11, 1988, the Regional Director, acting on the basis of the entire record in the proceeding, issued his decision determining that the business technicians and the warehouse attendant constituted an accretion to the existing bargaining unit. Pet. App. 9a-22a. The

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[1] The unit represented by the Union is a broad one, encompassing about 1275 employees in approximately 27 job classifications, including, inter alia, various technicians, mechanics, clerks, operators, and warehouse attendants. Pet. App. 10a, 11a n.3.

[2] "An accretion is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. The additional employees are then absorbed into the existing unit without first having an election and are governed by the unit's choice of bargaining representative." *Consolidated Papers, Inc.* v. *NLRB*, 670 F.2d 754, 756-757 (7th Cir. 1982).

Regional Director found that the "[b]usiness technicians and the warehouse attendant perform work very similar, and in many cases identical, to that performed by employees in the established bargaining unit." *Id.* at 20a. Additionally, the Regional Director found that, inasmuch as the existing unit was "wall-to-wall" or nearly "wall-to-wall," there was no basis on which to "carv[e] out a separate unit of business technicians and the warehouse attendant." *Id.* at 21a n.28. The Regional Director further noted "that the business technicians and warehouse attendant constitute a numerically small addition to the existing unit, and * * * could not constitute a separate, appropriate unit." *Id.* at 21a. Accordingly, he ordered that the existing unit be "clarified to include the South Division BSD business technicians and warehouse attendant." *Id.* at 22a.

Pursuant to Section 102.67(b) of the Board's Rules and Regulations, 29 C.F.R. 102.67(b), either UTC or the Union could have filed with the Board a request for review of the Regional Director's decision. Neither party filed such a request.

2. On October 5, 1988, petitioners filed a complaint in the United States District Court for the Middle District of Florida against the Board and the Union alleging that the unit clarification proceeding violated their First and Fifth Amendment rights. Pet. App. 27a-34a. The Board filed a motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that the district court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Pet. App. 35a-37a. The Union filed an answer to the complaint and a motion to join UTC as an indispensable party. *Id.* at 71a-75a, 76a-79a.

The district court dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 3a-8a. The court

noted that the Board has "broad discretion" in determining "the appropriate scope of a bargaining unit," and that its authority to determine "whether a group of employees should be accreted into that unit" is "clearly" established. *Id.* at 4a-5a. The court further noted that "normally" courts lack jurisdiction to review the Board's decisions in representation matters except where the decision "forms the basis of a final order issued in an unfair labor practice proceeding." *Id.* at 5a (citing *AFL* v. *NLRB,* 308 U.S. 401 (1940)).

Observing that petitioners "try to avoid th[is] jurisdictional limitation by asserting that their constitutional rights to due process and free association have been violated," Pet. App. 5a, the court found petitioners' constitutional arguments to be meritless. With respect to petitioners' First Amendment claims, the court noted that, while "Section 7 of the Labor Act provides * * * that all employees shall have the right either to 'join . . . labor organizations' or to 'refrain from . . . such activities,' " "[t]he rights guaranteed by Section 7 are not unqualified, and one well-recognized limitation results from the principle of exclusive representation embodie[d] in Section [9](a) of the Labor Act." Pet. App. 6a. Thus, "under Section 9(a), the representative selected by a majority of the employees in an appropriate bargaining unit represents all the employees in the unit, including that minority of the employees who did not choose to be represented by it and who would prefer to exercise their Section 7 right to refrain from being represented by it." *Ibid.*[3]

The court further noted that "[t]he Supreme Court [has] recognized that the restraints imposed on individual rights

[3] The court added that, insofar as petitioners claim a violation of a First Amendment right to refrain from compulsory unionism, the "Board's decision does not require [petitioners] to join the Union." Pet. App. 6a.

under the principle of exclusive representation would be wholly unjustifiable unless the exclusive representati[ve] had a reciprocal obligation to fully and fairly represent all the employees." Pet. App. 7a. Accordingly, "[t]he duty of fair representation was conceived as a protection for employees faced with the reduction of their individual rights corresponding with the grant of power to unions to act as their exclusive collective bargaining representative." *Ibid.* "In light of the well established principles governing majority rule and the protections given to the minority," the court concluded, "it is clear that [petitioners'] First Amendment allegation must fail." *Ibid.* The court also rejected petitioners' Fifth Amendment claim. Contrary to petitioners' assertion, "their right to due process has not been violated because they have no recognized property or liberty interest which has been invaded by the Board's decision." *Id.* at 8a. The court therefore dismissed petitioners' complaint for lack of subject matter jurisdiction.

3. The court of appeals summarily affirmed in a per curiam order. Pet. App. 1a-2a.

ARGUMENT

1. Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), empowers the Board to determine appropriate bargaining units, and Section 9(c)(1) of that Act, 29 U.S.C. 159(c)(1), empowers the Board to hold representation elections and issue certifications of collective bargaining representatives. With such express authority comes the implied authority to make "changes" in bargaining units, including the clarification of a unit, in light of

"changes in circumstances." See *United Glass & Ceramic Workers* v. *NLRB,* 463 F.2d 31, 35-36 (3d Cir. 1972) (citing Sections 9(b) and 10(d) of the Act, 29 U.S.C. 159(b) and 160(d)). Accordingly, the Board's Rules and Regulations, 29 C.F.R. 102.60(b), provide that "[a] petition for clarification of an existing bargaining unit, * * * in the absence of a question concerning representation, may be filed by a labor organization or by an employer." See also 29 C.F.R. 101.17 ("If there is a certified or currently recognized representative of a bargaining unit and there is no question concerning representation, a party may file a petition for clarification of the bargaining unit.").[4]

Proceedings conducted under the representation provisions of the Act are nonadversarial in nature and their results are not judicially reviewable final "order[s]." *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). Congress intended to preclude direct judicial review of representation determinations, and to permit indirect review of such determina-

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[4] Unlike an election petition under Section 9(c), 29 U.S.C. 159(c)—which seeks to determine the sentiments toward representation of employees in an appropriate unit—a unit clarification petition is a method of resolving disputes about whether certain new or substantially altered positions are appropriately included in an existing bargaining unit. The "theory of unit clarification" is that, because of their functional similarity to positions within the existing unit, new or substantially altered positions are appropriately included in an existing unit and the employees occupying those positions are properly governed by the larger, existing group's choice of bargaining representative. *NLRB* v. *Mississippi Power & Light Co.,* 769 F.2d 276, 279 (5th Cir. 1985). Accord *NLRB* v. *Security-Columbian Banknote Co.,* 541 F.2d 135 (3d Cir. 1976). This procedure contributes to "industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB* v. *Stevens Ford, Inc.,* 773 F.2d 468, 473 (2d Cir. 1985).

tions only if and when they form the basis for a final order issued in an unfair labor practice proceeding and are reviewable in the court of appeals under Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f). *AFL* v. *NLRB*, 308 U.S. at 404-412; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964); *Bishop* v. *NLRB*, 502 F.2d 1024, 1027 (5th Cir. 1974).

2. Petitioners seek to bring this case within the narrow exceptions recognized in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Fay* v. *Douds*, 172 F.2d 720 (2d Cir. 1949), to the rule that Board representation proceedings are not reviewable by district courts. See Pet. 7-23. That effort does not succeed.

a. In *Kyne*, the Court carved out an exception to the general rule of nonreviewability of Board representation determinations for "an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188. There, the Board had directed an election in an admittedly mixed bargaining unit of professional and nonprofessional employees without first having "a majority of such professional employees vote for inclusion in such unit," as is expressly required by Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1). In this case, by contrast, there has been no violation of any statutory mandate.

Petitioners contend that the Board violated Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), by failing to provide them with notice and an opportunity to be heard on the unit clarification issue. Pet. 13, 17 & n.47, 21-22. This contention is meritless. Section 9(c)(1), which applies only to petitions for representation elections, requires notice and a hearing only where the Board finds that there is "reasonable cause to believe that a question of representation affecting commerce exists." By contrast, a unit clarification petition can be processed only where the Board

finds that a question of representation does *not* exist. See p. 6, *supra*. Moreover, a unit clarification proceeding is an incident of the Board's power under Section 9(b), 29 U.S.C. 159(b), to define appropriate units, and that Section has no hearing requirement.[5]

b. Petitioners further contend that the imposition of a union representative without notice, hearing, and an opportunity to vote results in a deprivation of their constitutional rights. Thus, they argue that the decision below conflicts with the holding in *Fay* v. *Douds*, 172 F.2d 720, 723 (2d Cir. 1949), that district courts have jurisdiction over representation proceedings where the plaintiff makes a "not transparently frivolous" assertion that those proceedings violate his constitutional rights. Pet. 7-11, 13-17, 22-23. The district court and court of appeals correctly concluded that petitioners' constitutional claims were patently insubstantial.[6]

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[5] Petitioners also contend, Pet. 19-20, that, even if they lack an express statutory right to notice and an opportunity to be heard in the unit clarification proceeding, such a right must be read into the statute under *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938). That contention is without merit. Unlike the union in *Consolidated Edison*, whose contract rights were affected by the Board's decision, petitioners have no judicially cognizable interest of which they are being deprived. See pp. 9-11, *infra*. Accordingly, here, unlike the situation in *Consolidated Edison*, no notice and hearing requirement must be read into the applicable statutory language to assure its constitutionality.

[6] It is far from clear, however, that the district court would have had jurisdiction even if this matter involved a substantial claim of violation of constitutional rights. This Court has never approved the *Fay* exception. See *Boire* v. *Greyhound*, 376 U.S. at 480-481 (surveying the exceptions to the nonreviewability rule). And its continued validity has been questioned by the circuit that created it—see *Utica Mutual Ins. Co.* v. *Vincent*, 375 F.2d 129, 134 (2d Cir. 1967), and *Herald Co.* v. *Vincent*, 392 F.2d 354, 359 (2d Cir. 1968) (both ques-

Contrary to petitioners' contention, they have no constitutionally conferred right to contract individually with their employer. Pet. 7, 14-16. Thus, while the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances, see *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972), this is "not an absolute right," but one which may be restricted by government "in the public interest." *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 392 (1937).

In the area of labor relations, Congress, in order to promote industrial peace, established the principle of collective bargaining through an exclusive representative selected by a majority of the bargaining unit. 29 U.S.C. 159(a). This principle of "necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967). Moreover, the exclusive representation principle "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB* v. *Allis-Chalmers Mfg.,* 388 U.S. 175, 180 (1967). See also *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 61-70 (1975); *Vaca* v. *Sipes,* 386 U.S. at 182.[7] While

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tioning whether the *Fay* exception survived *Boire* v. *Greyhound*)—as well as by several other circuits, see *NLRB* v. *Interstate Dress Carriers, Inc.,* 610 F.2d 99, 107 (3d Cir. 1979); *Greensboro Hosiery Mills, Inc.* v. *Johnston,* 377 F.2d 28, 32 (4th Cir. 1967); *Boire* v. *Miami Herald Publishing Co.,* 343 F.2d 17, 21 (5th Cir.), cert. denied, 382 U.S. 824 (1965); *Blue Cross & Blue Shield* v. *NLRB,* 609 F.2d 240, 244-245 (6th Cir. 1979); *Squillacote* v. *International Bhd. of Teamsters, Local 344,* 561 F.2d 31, 37-39 (7th Cir. 1977).

[7] Petitioners' reliance, Pet. 7 & n.14, on *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229 (1917), is misplaced. *Hitchman* was decided

individual contracts are not prohibited per se, "[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, *nor to exclude the contracting employee from a duly ascertained bargaining unit* * * * or condition the terms of the collective agreement." *J.I. Case Co.* v. *NLRB,* 321 U.S. 332, 337 (1944) (emphasis added).[8]

Similarly without substance is petitioners' contention that they have a constitutionally conferred "liberty not to associate with unions," which entitles them not to be represented by the statutory bargaining representative. Pet. 7, 20-21. Thus, this Court has definitively established that, in view of the exclusive bargaining representative's duty to represent fairly all employees in the unit,[9] the Constitution does not preclude a minority from being represented by the representative selected by the majority. *Steele* v. *Louisville & N. R.R.,* 323 U.S. 192, 198-201, 204

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before the enactment of both the Wagner Act and the Railway Labor Act, and the language upon which petitioners rely has been superseded by congressional regulation and the case law developed thereunder. See, *e.g., Texas & N.O. R.R.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 560-561 (1930); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 43-44 (1937); *J.I. Case Co.* v. *NLRB,* 321 U.S. 332, 337 (1944).

[8] Petitioners' related contention, Pet. 7—that they have a property right in the compensation, benefits, and working conditions embodied in their individual employment contracts—is predicated on their erroneous assumption that they have an absolute right to individual contracts affording them working conditions different from those embodied in the collective bargaining agreement.

[9] The Act imposes upon a union the obligation to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes,* 386 U.S. at 177.

(1944); *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 255 (1944). See *Vaca* v. *Sipes*, 386 U.S. 171, 177, 182 (1967). Moreover, Congress left it largely to the Board to formulate the procedures for determining the bargaining representative of a particular unit and for deciding what employees are to be included in that unit. See *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). The constitutionality of that regulatory scheme has been upheld by this Court. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-47 (1937).[10]

c. Contrary to petitioners' contention, Pet. 12-13, 18-19, the decisions below do not conflict with *Bell* v.

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[10] Petitioners contend that, whatever the constitutional status of the exclusive representation principle where the very employees in question have had an opportunity to participate in a Board-conducted election, the principle cannot be constitutionally applied where, as here, the employees being accreted to the unit have not had such an opportunity. Pet. 20-21. In order to be constitutionally entitled to procedural protections, however, one needs to be deprived of a constitutionally protected right. Here, there is no such right. Moreover, the logical premise of petitioners' argument is, in essence, that, in order for the exclusive representation principle to be constitutional, any employee who is newly hired or transferred into a bargaining unit position must be afforded an opportunity to participate in a representation election. Such a result would fundamentally undercut the statutory purpose of promoting industrial stability. See 29 U.S.C. 151 (defining the purpose of the Act as promotion of industrial peace and stability); 29 U.S.C. 159(c)(3) (limiting to one the number of valid elections in any twelve-month period). In the interest of industrial stability, new hires and transferees are required to accept the existing representative of the bargaining unit for certain periods of time even though they did not have an opportunity to be heard or to vote on the selection of that representative. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-39 (1987); *NLRB* v. *Burns Int'l Security Services*, 406 U.S. 272, 279 n.3, 290 n.12 (1972); *Brooks* v. *NLRB*, 348 U.S. 96 (1954) (discussing the Board's contract bar rule and its various presumptions of the union's continued majority status).

Hood, 327 U.S. 678 (1946). While that case holds that a federal court may not dismiss for lack of jurisdiction a substantial claim arising under federal law or the Constitution, it recognizes that dismissal for lack of jurisdiction is proper where the claim is "wholly insubstantial and frivolous." *Id.* at 682-683. See *Hagans* v. *Lavine*, 415 U.S. 528, 537 (1974); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3564 (2d ed. 1984). Since petitioner's challenge to the Board's unit clarification decision is clearly insubstantial, the portion of the complaint seeking review of that decision was properly dismissed for lack of subject matter jurisdiction.

3. For similar reasons, petitioners' duty-of-fair-representation claim against the union was properly dismissed for lack of jurisdiction. While the district court has jurisdiction to entertain substantial fair representation claims, *Breininger* v. *Sheet Metal Workers*, 110 S. Ct. 424 (1989), petitioners' claim was wholly devoid of merit. A union's duty of fair representation arises out of its status as the exclusive bargaining representative of the employees in a particular unit. *International Bhd. of Electrical Workers* v. *Foust*, 442 U.S. 42, 46 n.8 (1979); *Vaca* v. *Sipes*, 386 U.S. at 182. A union therefore cannot owe an individual that duty until the individual becomes a member of such a unit. *Abilene Sheet Metal, Inc.* v. *NLRB*, 619 F.2d 332, 346-347 (5th Cir. 1980). See generally *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964) (the scope of the union's authority to act as exclusive bargaining agent and of its duty to represent employees fairly are "equal"). Here, prior to the Board's clarification of the unit to include petitioners, they were not members of that unit and hence the Union owed them no duty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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